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Presentment Date: September 30, 2013
Presentment Time: 12:00 noon

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re

Citicare, Inc., **Chapter 11**

Debtor. **Case No. 13-11902-alg**
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DEBTOR'S MOTION SEEKING
AN ORDER EXTENDING THE TIME BY WHICH IT MUST ASSUME
OR REJECT UNEXPIRED LEASE OF NON-RESIDENTIAL REAL PROPERTY.

TO: THE HONORABLE ALLAN L. GROPPER,
UNITED STATES BANKRUPTCY JUDGE

Citicare, Inc., the debtor and debtor-in- (the "Debtor"), by its undersigned counsel, Law Offices of Gabriel Del Virginia, submits the instant motion (the "Motion") and hereby seeks the entry of an Order pursuant to 11 U.S.C. §§105 and 365, extending the Debtor's time within which it must assume or reject the Debtor's unexpired lease of non-residential real property (the "Lease") for a period of ninety (90) days, up to and including January 5, 2014 (the "Extension"), and respectfully sets forth and represents as follows:

CASE BACKGROUND.

1. The Debtor filed its voluntary petition for relief under chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§101 et seq. (the "Bankruptcy Code") on June 9, 2013 (the "Petition Date"). The Debtor continues to manage its property as a debtor and debtor-in-possession. No trustee or examiner has been appointed in this case. Also, no official committee of unsecured creditors has been appointed.

2. No trustee or examiner has been appointed in this case. Also, no official committee of unsecured creditors has been appointed.

3. The Debtor is a New York Corporation, and is a New York State Licensed Diagnostic and Treatment Center providing comprehensive primary and specialty care to medically underserved communities. The Debtor operates from its premises (the "Premises") located at 154 West 127th Street in the borough of Manhattan, City of New York.

4. The Debtor's emergent need to seek relief was necessitated by the Internal Revenue Service (the "IRS") levying the Debtor's accounts for tax liability. Additionally, the New York Department of Health ("NYDPH") alleges that it is owed approximately $300,000 and, as a result, is withholding payment for the Debtor's services until the matter is resolved. The withholding

of payment by the NYDPH has had an adverse effect on the Debtor's business.

5. The failure of the Debtor's business would adversely affect the medically underserved community of which many of its residents rely upon the Debtor as their primary source of medical care.

6. The Debtor's management believes that, given the breathing spell provided by the filing of this case, the Debtor will be able restructure its finances, find an investor and/or consensually resolve any issues with the IRS or NYDPH to successfully reorganize.

DEBTOR'S LEASE

7. The Debtor is the tenant of the Premises pursuant to a written lease, (the "Lease") with TWC Urban Realty,LLC the Landlord. The Lease commenced in July 2007 and runs for the period of 11 years and expires in 2018. The monthly base rent is currently $42,755.00 plus utilities and other customary charges. (A true copy of the Lease is attached as Exhibit A.)

RELIEF SOUGHT HEREIN.

8. The Lease is by all measures the Debtor's most valuable asset. Moreover, if the Debtor does not succeed in extending the time reject or assume the Lease, the Lease would be rejected by operation of law and liquidation would likely follow. Such

liquidation would be unquestionably detrimental to the Debtor's creditors and its employees.

9. The Debtor seeks in this Motion, an extension of its time to assume or reject its Lease for a period of ninety days (90) days, up through and including January 5, 2014.

JURISDICTION AND STATUTORY PREDICATE.

10. This Court has jurisdiction over this Motion as a "core proceeding" under 28 U.S.C. §§157(a) and (b)(2)(A) and 1334, and the Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York.

11. Venue of this case is proper in this district under 28 U.S.C. §§1408 and 1409. The basis for the relief sought herein is 11 U.S.C. §§ 105(a) and 365(d)(4).

12. Section 365 of the Bankruptcy Code provides, in relevant part, that:

> (4)(A) Subject to paragraph (B), an unexpired lease of nonresidential real property under which the debtors is the lessee shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of:
>
> (i) the date that is 120 days after the date of the order for relief; or
>
> (ii) the date of the entry of an order confirming a plan.
>
> (B)(i) the court may extend the period determined under subparagraph (A), prior to the expiration of the 120-day

> period, for 90 days on the motion of the trustee or lessor for cause.
>
> (ii) If the court grants an extension under clause (i), the court may grant a subsequent extension only upon prior written consent of the lessor in each instance.

U.S.C. §365(d)(4).

13. Accordingly, a debtor--initially--is granted with one-hundred-twenty (120) days from the date of its filing in which to elect whether to assume or reject an unexpired lease of non-residential real property under which the debtor is the lessee. In recognition that the initial one-hundred-twenty (120) day period may not provide a debtor sufficient time in which to moderate its financial affairs and formulate a plan to exit bankruptcy, the statute gives the Court discretion to extend such period for an additional ninety (90) days, without the necessity of the consent of the landlord for the affected property. After the two-hundred-ten (210) days, a debtor can thereafter extend its time to assume or reject only upon the prior written consent of its lessor. Accordingly, 11 U.S.C. §365(d)(4)(B)(i) specifically provides that the Court may extend the initial one-hundred-twenty (120) day period and, thus, allow the debtor-in-possession an additional 90 days.

14. The Debtor's time to assume or reject the Lease currently expires on October 7, 2013, and the Debtor seeks herein, to extend its time to assume or reject the Lease for an additional ninety

(90) days allowed by the Bankruptcy Code -- up, through and including January 5, 2014.

15. Although the amendments to Section 365 of the Bankruptcy Code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 may have restricted a Debtor's ability to extend its time to assume or reject unexpired leases, an extension under Section 365(d)(4)(B)(I) still requires that "cause" be established. *See id.* The Debtor respectfully submits that ample cause exists here for an extension of time to assume or reject the Lease.

16. The factors a court considers when determining whether to grant a debtor additional time to assume or reject unexpired leases of non-residential real property are:

> (i)Whether the debtor was paying for the use of the property;
>
> (ii)Whether the debtor continued occupation . . . could damage lessor beyond the compensation available under the bankruptcy code;
>
> (iii)Whether the lease is the Debtor's primary asset; and
>
> (iv)Whether the debtor has had sufficient time to formulate a plan.

South Street Seaport Ltd. Partnership v. Burger Boys, Inc., (In re Burger Boys, Inc.) 94 F.3d 755, 761 (2d Cir. 1996); *Theatre Holding Corp. v. Mauro*, 681 F.2d 102 (2d Cir. 1982) and *In re Wedtech Corp.*, 72 B.R. 464, 471-72 (Bkrtcy.S.D.N.Y. 1987); *see also*

3 COLLIER ON BANKRUPTCY §365.04[4], n. 74f (15th ed. Revised 2006) (stating that "prior law interpreting [non-amended provisions of section 365(d)(4)] should continue to apply. . .").

17. In the instant case, the Debtor continues to pay timely the Landlord for its use of its leased premises. The Debtor requires the additional time sought herein to determine whether it will reorganize as a continuing business or sell the business. Importantly, the Debtor operates its enterprise exclusively from the Leased Premises. Accordingly, the Lease is without doubt its primary asset. Finally, owing to the "un-knowns" attendant to the aforementioned decisions regarding operating as a continuing business or the sale of the business, the Debtor has not yet been able to contemplate all of the details of a plan. Thus, when, as here, a chapter 11 case is only at its earliest stage, and a debtor in possession has not yet had a meaningful opportunity to formulate a plan of reorganization, courts have not hesitated to grant extensions of time under section 365(d)(4) of the Bankruptcy Code, 11 U.S.C. § 365(d)(4). *Legacy, Ltd. v. Channel Home Ctrs., Inc. (In re Channel Home Ctrs., Inc.)*, 989 F.2d 682, 689 (3d Cir. 1993), cert. denied, 510 U.S. 865 (1993).

18. All of the factors that a court considers when determining whether to grant a debtor additional time to assume or reject unexpired leases of non-residential real property are present.

(i) The Debtor is current in its rent for the Premises;

(ii) The Landlord will not be harmed by the extension;

(iii) The Lease is the Debtor's primary asset; and

(iv) The Debtor has not had sufficient time to formulate a plan.

19. Accordingly, the Debtor requests an extension of its time to assume or reject the Lease for a period of ninety (90) days, through and including January 5, 2014

20. The Debtor respectfully submits that no party in interest will suffer undue harm if the extension requested herein is granted and that such extension is clearly in the best interests of its estate and its creditors, and, therefore, submits that the Court should grant the relief requested herein.

21. No other request for the relief sought herein has been made to this or any other Court.

22. The Debtor has given notice of this Motion by mailing a copy of the Notice of Presentment to all known creditors and Notice of Presentment and the Motion to (i) the Office of the United States Trustee, Southern District of New York (ii) the Landlord.

WHEREFORE, the Debtor respectfully requests:

(a.) The entry of an Order pursuant to 11 U.S.C. §§105 and 365(d)(4)(B)(ii), extending the Debtor's time within which to assume or reject the Lease, up through and including January 5, 2014, without prejudice to seeking further extensions upon the written consent of the Landlord, for cause shown.

(b.) Such additional relief as may be appropriate.

Dated: September 11, 2013
New York, New York

/s/ Gabriel Del Virginia
Gabriel Del Virginia (GDV-4951)
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Exhibit A

This Document is voluminous and is available by contacting the Debtor’s attorney.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
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In re

Citicare, Inc., **Chapter 11**

Debtor. **Case No. 13-11902-alg**
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ORDER GRANTING EXTENSION OF DEBTOR'S TIME BY WHICH TO
ASSUME OR REJECT UNEXPIRED NONRESIDENTIAL REAL PROPERTY LEASE

Upon the motion (the "Motion") of Citicare, Inc., the within debtor and debtor in possession(the "Debtor"), by its attorneys, Law Offices of Gabriel Del Virginia, seeking the entry of an order, under §§105(a) and 365(d)(4)(B)(i) of Title 11 of the United States Code (the "Bankruptcy Code") further extending the time by which the Debtor must assume or reject its unexpired lease of nonresidential real property, as such lease is described in the Motion (the "Lease") for an additional ninety (90) days through and including January 5, 2014 and granting such additional relief as the Court may deem just and proper; and upon the certificate of service of the Motion filed with the Clerk of the Court; and upon no objection to the Motion having been interposed before the Presentment; and no other notice being necessary or required; and after due deliberation and good and sufficient cause appearing therefor; it is hereby

ORDERED, that the Motion is granted to the extent provided for herein; and it is further

ORDERED, that the Debtor's time within which to assume or reject the Lease be, and it hereby is, extended through and including January 5, 2014, without prejudice to further extensions being sought by the Debtor under 11 U.S.C. §365(d)(4)(B) upon the consent of the Landlord; and, it is further

ORDERED, that the Debtor is authorized, empowered and directed to do such things, execute such documents and expend such funds as are necessary to implement the terms and conditions of this order.

Dated:
New York, New York
October 2013

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UNITED STATES BANKRUPTCY JUDGE